

Chapter ATCP 100

DAIRY PLANT PAYMENTS TO MILK PRODUCERS; SECURITY

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Note: Chapters Ag 7, 8, 102 to 104 as those chapters existed on November 30, 1992 were repealed, renumbered and revised into chapter Ag 100; Chapter Ag 100 was renumbered chapter ATCP 100 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

Note: This chapter interprets ss. 93.15, 97.20, 100.20 and 100.22, Stats. Violations are subject to the sanctions provided under ss. 93.21(4), 97.72, 97.73, 100.20, 100.22(4) and (5), 100.24, and 100.26(3)(5) and (6), Stats. Violations of this chapter may also result in license sanctions under ss. 93.06(7) and (8) and 97.20, Stats.

Subchapter I — Definitions; Licensing

ATCP 100.01 Definitions. In this chapter:

- (1) "Asset" means anything of value owned.
- (2) "Audited financial statement" means a financial statement on which an independent public accountant holding a certificate of authority under ch. 442, Stats., or an independent certified public accountant, has done both of the following:
 - (a) Expressed an opinion in accordance with generally accepted accounting principles.
 - (b) Conducted an audit in accordance with generally accepted auditing standards.
- (3) "Balance sheet" means a statement of assets, liabilities and equity on a fixed date.
- (4) "Cash flow to debt service ratio" means the result obtained by dividing the total of net income plus noncash expenses plus interest expense by the total of interest expense plus current maturities of long-term debt.
- (5) "Current assets" means cash and assets, including trade or investment items, that may be readily converted into cash in the ordinary course of business within one year from the date of the balance sheet, except as provided in s. ATCP 100.35.
- (6) "Current liabilities" means liabilities due and payable within one year from the date of the balance sheet.
- (7) "Dairy farm" has the meaning specified in s. 97.22 (1) (a), Stats.
- (8) "Dairy plant" means a dairy plant, as defined in s. 97.20 (1) (a), Stats., whose operator buys milk from producers. "Dairy

plant" includes a dairy plant outside this state whose operator buys milk from producers located in this state.

(9) "Dairy plant operator" means either of the following:

- (a) A person who holds, or is required to hold, a dairy plant license under s. 97.20, Stats., and who buys milk from producers.
- (b) A person who operates a dairy plant outside this state, and who buys milk from Wisconsin producers for delivery to that out-of-state dairy plant.

(10) "Department" means the state of Wisconsin department of agriculture, trade and consumer protection.

(11) "Equity" means the excess of total assets over total liabilities.

(12) "Equity statement" means a report of the change in equity from the beginning to the end of the accounting period covered by the report.

(13) "Income statement" means a report of the financial results of operations for the accounting period covered by the report.

(14) "Interim financial statement" means a financial statement prepared as of a date other than the end of a fiscal year.

(15) "Liability" means an obligation to pay money or other assets or to render a service to another person.

(16) "Long-term liability" means debts due or payable more than one year from the date of the balance sheet.

(17) "Maximum liability to producers" means the largest aggregate amount owed by a dairy plant operator to producers at any time since May 1 of the last preceding license year, calculated according to the method prescribed under s. ATCP 100.45 (4). If a dairy plant operator buys milk from producers located in this state for delivery to the operator's dairy plant located outside this state, "maximum liability to producers" for that dairy plant means maximum liability to producers in this state.

(18) "Milk" has the meaning specified in s. 97.22 (1) (e), Stats.

(18d) "Milk handler" means a person, other than a producer agent or a dairy plant operator who buys milk from producers, who does any of the following:

(a) Buys milk from producers, other than for personal or household consumption.

(b) Manufactures dairy products from milk owned by producers, and markets those dairy products without taking title to the milk or dairy products.

(18m) "Proceeds" has the meaning specified under s. 409.306, Stats.

(19) "Producer" means any of the following:

(a) A person who owns or operates a dairy farm in this state and sells or distributes milk produced on that farm.

(b) A person who owns or operates a dairy farm in another state and sells or distributes milk produced on that farm to a dairy plant located in this state.

(c) A producer agent.

(19m) "Producer agent" means a person who markets milk on behalf of a producer and who qualifies as a producer agent under s. ATCP 100.57 (1).

(20) "Producer claim" means either of the following:

(a) A claim by a producer or the producer's assignee for payment from a dairy plant operator for milk produced by the producer.

(b) A claim by a producer agent on behalf of producers or their assignees.

(21) "Secretary" means the secretary of the department or the secretary's designee.

(22) "Statement of cash flows" means a report of cash receipts and cash payments from operating, investing and financing activities, including an explanation of changes in cash and cash equivalents for the accounting period covered by the report.

(23) "Verified financial statement" means a financial statement that contains a notarized statement, signed and sworn to by the dairy plant operator, attesting that the financial statement is correct.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.01 and am. (5), (9) (a) and (17), cr. (18m), Register, November, 1992, No. 443, eff. 12-1-92; cr. (18d) and (19m) r. and recr. (19) (c), am. (20) (b), Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.05 Dairy plant license applications. Every application for a dairy plant license under s. 97.20, Stats., shall include the sworn and notarized statement required under s. ATCP 100.20 and any other information the department requires. An applicant for an initial dairy plant license shall file a year-end financial statement under s. ATCP 100.25 (2) or, if the applicant has not previously engaged in business, an opening balance sheet and notes under s. ATCP 100.25 (5) (d). A licensed dairy plant operator shall file periodic financial statements as required by s. ATCP 100.25.

Note: See ch. ATCP 61 regarding dairy plant licensing under s. 97.20, Stats. A dairy plant license is not transferable between operators or locations. A dairy plant outside this state that buys milk from Wisconsin producers is not subject to licensing under s. 97.20, Stats., but is required to comply with this chapter and s. 100.06, Stats. (2001 Wis. Act 16 repealed s. 100.06, Stats.)

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.05 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.06 Fees for milk producer security program. **(1)** Pursuant to s. 100.06 (9), Stats., every dairy plant operator shall pay to the department a fee as provided under sub. (2) for milk purchased from producers, including milk purchased through producer agents. The dairy plant operator shall pay the fee on each month's milk deliveries on or before the 18th day of the following month. A dairy plant operator may not charge the fee under this section back to producers.

Note: 2001 Wis. Act 16 repealed s. 100.06, Stats.

(2) A dairy plant operator shall pay the following fee under sub. (1) for each 100 lbs. of milk received by the dairy plant operator:

(a) For milk received before the first day of the month following April 1, 1994, 0.1 cent.

(b) For milk received on or after the 1st day of the month following April 1, 1994, 0.15 cent.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92; renum. to be (1), cr. (2), Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.10 Suspension or revocation of license.

(1) GENERAL. Following notice and hearing, the secretary may suspend or revoke a dairy plant license for cause, including any of the following:

(a) The dairy plant operator fails to provide relevant information requested by the department or required by department rules.

(b) The dairy plant operator fails to file security under s. ATCP 100.45 or enter into a trusteeship under subch. V by a date the department specifies.

(c) The dairy plant operator violates any provision of this chapter.

(d) The dairy plant operator violates any provision of s. 100.06, Stats.

Note: 2001 Wis. Act 16 repealed s. 100.06, Stats.

(2) SUMMARY ORDER SUSPENDING MILK PROCUREMENT FROM PRODUCERS. The secretary may, without prior hearing, summarily prohibit a dairy plant operator from buying milk from producers if the secretary finds that the summary order is necessary to prevent an imminent threat of financial loss to producers. An order under this subsection shall set forth the basis for the order. Unless the dairy plant waives its right to a hearing, the department shall conduct an informal hearing as soon as reasonably possible, but not more than 10 days after the order is issued. The department shall hold a contested case hearing under ch. 227, Stats., on any issues relevant to the order that are not resolved by the informal hearing.

Note: This section does not limit the department's authority to suspend or revoke a dairy plant license for any authorized reason not listed in this section, including violations of ch. 97, Stats., or rules issued thereunder. Nor does it limit the department's authority to summarily suspend a dairy plant license in an emergency, based on an appropriate finding under s. 227.51 (3), Stats.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.10 and am. Register, November, 1992, No. 443, eff. 12-1-92.

Subchapter II — Financial Standards and Security

ATCP 100.20 Payroll information. **(1) ANNUAL STATEMENT REQUIRED.** Before May 1 of each year, every dairy plant operator shall file with the department a sworn and notarized statement, signed by the operator, containing the information required under sub. (2). The dairy plant operator shall file a separate statement for each Wisconsin dairy plant which is subject to licensing under s. 97.20 Stats., and for each out-of-state dairy plant which receives milk from producers as defined in s. ATCP 100.01 (19). If a dairy plant is located in this state, the operator shall file the statement for that dairy plant with the operator's annual license application under s. 97.20, Stats.

(2) STATEMENT CONTENTS. The sworn and notarized statement under sub. (1) shall be filed on a form provided by the department, and shall include all of the following:

(a) The operator's correct legal name and any trade name used by the operator. The operator's legal name shall match the legal name used on the operator's dairy plant license application under s. 97.20, Stats. If the operator is a corporation, partnership or co-operative, the statement shall identify each corporate officer or partner.

(b) The location of the dairy plant to which the statement pertains, and the name of a responsible person who may be contacted at that location.

(c) The largest gross amount paid by the dairy plant operator to producers for milk received by the dairy plant in any payroll period during the year beginning on the preceding May 1. The state-

ment shall identify the payroll period, the amount and date of any advance payment, and the amount and date of the final payment.

(d) The number of producers from whom the dairy plant operator receives milk, and the identity of any producer agents from whom producer milk is received.

(e) The name of the bank used for producer milk checks.

(f) The identity of every person to whom milk or dairy products from the dairy plant are sold.

(g) The basis on which the producer milk prices are determined, including any provision for milk component premiums.

(h) Any other relevant information required by the department.

(3) INCREASED MAXIMUM PAYROLL; NOTICE TO DEPARTMENT. If a dairy plant operator is covered by a trusteeship under subch. V, or if the operator files or is required to file security with the department under s. ATCP 100.45, the operator shall immediately notify the department if, at any time, the operator has reason to believe that the operator's producer payroll may exceed the maximum producer payroll last reported to the department under sub. (2) (c).

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.20 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.25 Financial statements. (1) QUARTERLY FINANCIAL STATEMENTS. (a) Every dairy plant operator shall file quarterly financial statements with the department, whether or not the operator files security with the department under s. ATCP 100.45 or is covered by a trusteeship under subch. V. A dairy plant operator shall file quarterly financial statements for the first 3 quarters of the operator's fiscal year.

(b) Quarterly financial statements under par. (a) may be verified financial statements, unless an audited financial statement is required under sub. (2) (b) or by the department.

(c) Except as provided under sub. (2) (c), each quarterly financial statement shall be filed within 60 days after the end of the fiscal quarter to which the statement pertains.

(2) YEAR-END FINANCIAL STATEMENT. (a) Every dairy plant operator shall annually file a year-end financial statement with the department. The year-end financial statement shall cover the operator's most recently completed fiscal year.

(b) Every year-end financial statement under par. (a) and every initial financial statement under sub. (5) (d) shall be an audited financial statement, except that if a dairy plant operator files security with the department in the amount prescribed under s. ATCP 100.45 (4) or is covered by a trusteeship under subch. V, the operator may file a verified financial statement.

(c) Every dairy plant operator shall file a year-end financial statement by the 15th day of the 4th month following the close of the operator's fiscal year.

(d) The department may extend the date for filing an annual financial statement under par. (c) by up to 30 days. The department may only grant the extension in response to a written request by the dairy plant operator or the accountant that prepares the dairy plant operator's annual financial statement. The extension request shall be filed with the department at least 10 days before the deadline date specified in par. (c), and shall state the reason for the requested extension.

(3) SUPPLEMENTARY OR INTERIM FINANCIAL STATEMENTS. The department may require a dairy plant operator to file supplementary financial statements or interim financial statements at any time, containing information the department specifies. Supplementary or interim financial statements need not be audited or verified, except as required by the department.

(4) AUDITED FINANCIAL STATEMENTS; ACCOUNTING PRINCIPLES. Every audited financial statement shall be prepared according to generally accepted accounting principles and this chapter.

(5) FINANCIAL STATEMENT CONTENTS. (a) A quarterly financial statement under sub. (1) shall include a balance sheet, income statement and any other information required by the department.

(b) Except as provided under par. (c) or (d), every year-end financial statement required under sub. (1) or (2) shall consist of a balance sheet, income statement, equity statement, statement of cash flows, notes to these statements, and any other information required by the department.

(c) If a dairy plant operator files security with the department under s. ATCP 100.45 or is covered by a trusteeship under subch. V, the operator's year-end financial statement shall consist of a balance sheet, income statement and any other information required by the department.

(d) A dairy plant operator who has not previously engaged in business may file an initial financial statement consisting of an opening balance sheet and notes to the balance sheet. Thereafter, the operator shall file periodic financial statements as required under this section.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.25 and am. Register, November, 1992, No. 443, eff. 12-1-92; cr. (2) (d), Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.30 Preparation of financial statements.

(1) CLASSIFICATION OF ASSET ACCOUNTS. In any classification of asset accounts, a dairy plant operator's financial statement shall specifically identify assets not recognized as current assets under this chapter.

(2) NOTES AND ACCOUNTS RECEIVABLE. (a) In a dairy plant operator's financial statement, notes and accounts receivable arising in the ordinary course of trade shall be identified separately from notes and receivables which do not arise in the ordinary course of trade. Financial statements shall describe any note or account representing 15% or more of all notes or accounts receivable, respectively. The description shall indicate the name of the person from whom payment is due and the amount due.

(b) A dairy plant operator's financial statement shall specifically identify and explain the following notes and accounts receivable:

1. Notes and accounts receivable from officers, directors, partners, employees or stockholders, or from members of their families, other than trade accounts arising in the ordinary course of trade.

2. Notes and accounts receivable from parent organizations, subsidiaries or affiliates, including trade accounts arising in the ordinary course of trade.

(c) A dairy plant operator's financial statement shall include an aging summary of all notes and accounts receivable.

(d) A dairy plant operator shall maintain reasonable allowances for doubtful or uncollectible items and shall identify those allowances in the operator's financial statements.

(3) INVENTORY. A dairy plant operator's financial statement shall identify inventories of dairy products manufactured and held for sale separately from other classes of inventory, such as materials and supplies or merchandise purchased for resale. Inventories not in marketable or saleable condition are not current assets. Financial statements shall describe the basis on which inventory values are determined.

(4) OTHER CURRENT ASSETS. A dairy plant operator's financial statement shall specifically identify the nature or character of other current assets. The financial statement shall separately describe temporary investments, identifying the specific security, the number of shares held and their market value.

(5) FIXED ASSETS. A dairy plant operator's financial statement shall identify fixed assets according to each major class of property included. The dairy plant operator shall report all fixed assets at cost less depreciation and shall submit a summary of fixed assets and related provisions for depreciation transactions with the dairy plant financial statements.

(6) OTHER ASSETS. A dairy plant operator's financial statement shall identify other assets separately from current assets, describing the nature of each asset classified under "other assets"

and its current value. Assets of a purely personal or private nature, which are exempt from execution or attachment, may not be included as a business asset by sole proprietors or partnerships.

(7) **CURRENT LIABILITIES.** (a) A dairy plant operator's financial statement shall show current liabilities separately from long-term liabilities. Current liabilities shall include the current portion of all long-term obligations as well as any other items of a current nature. The financial statement shall set forth current liabilities, including all notes and accounts payable, deferred income and accrued expenses, in sufficient detail that the specific nature of the liability and the amount owed can be readily determined.

(b) A dairy plant operator's financial statement shall show milk payable accounts separate from other trade accounts and shall identify amounts due producers, haulers and others under milk check assignments.

(c) A dairy plant operator's financial statement shall detail each trade account representing 15% or more of all trade accounts, showing the name of each trade creditor and the amount owed.

(d) A dairy plant operator's financial statement shall specifically identify the current portion of all notes and mortgages payable. The financial statement shall separately state notes and mortgages payable to officers, directors, employees or stockholders, or to members of their families, as well as to parent, subsidiary or affiliated organizations.

(8) **LONG-TERM LIABILITIES.** A dairy plant operator's financial statement shall fully describe all notes, mortgages or other obligations not due or payable within one year, including the nature of the obligation, the amount owed and the terms of payment.

(9) **GENERAL NOTES TO FINANCIAL STATEMENTS.** A dairy plant operator's financial statement shall include the following information, if material:

(a) The amount and a brief description of any assets mortgaged, pledged or subject to a lien.

(b) Defaults in payment of any obligations.

(c) A brief statement as to contingent liabilities.

(d) A statement of judgments, suits, liens or claims pending against the dairy plant operator.

(e) A statement as to whether the dairy plant operator has acted as surety, bondsman or accommodation party on notes or obligations of another.

(f) A description of any changes in accounting principles used that would affect comparability of the dairy plant operator's financial statement with prior financial statements.

(g) A statement as to whether the books and records of the dairy plant operator are inadequate for purposes of providing dependable financial statements.

(h) Disclosure of any deceptive manipulation of accounts, including temporary funding of current liabilities to effect "window dressing".

(i) Any other facts or circumstances that may affect the reliability of the financial statement, the financial liquidity of the dairy plant operator or the operator's ability to pay producers.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.30, Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.35 Assets excluded from financial standard calculations. The department shall exclude the following assets when it calculates whether a dairy plant operator complies with the financial standards under s. ATCP 100.40:

(1) All assets of doubtful value.

(2) Nontrade notes and accounts receivable from officers, directors, employees, partners or stockholders, or from members of their families.

(3) Notes and accounts receivable from parent organizations, subsidiaries or affiliates unless the department finds the current fi-

nancial position of the organization, subsidiary or affiliate justifies the inclusion of these assets.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.35 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.40 Minimum financial standards. (1) REQUIREMENT. Except as provided under sub. (3), a dairy plant operator shall meet all of the following financial standards:

(a) The dairy plant operator's ratio of current assets to current liabilities shall be at least 1.25 to 1.00.

(b) The dairy plant operator shall have equity equal to at least 35% of total assets.

(c) The dairy plant operator shall have a cash flow to debt service ratio of at least 1.50 to 1.00.

Note: These minimum financial standards are required by s. 100.06, Stats., as amended by 1989 Wis. Act 336. (2001 Wis. Act 16 repealed s. 100.06, Stats.)

(2) **NOTIFICATION OF CHANGES.** A dairy plant operator shall immediately notify the department if the operator knows or has reason to know that any of the financial standards under sub. (1) are no longer being met.

(3) **EXEMPTION; FILING SECURITY.** A dairy plant operator is not required to meet the financial standards under sub. (1) if the operator files security with the department under s. ATCP 100.45 or is covered by a trusteeship under subch. V.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.40 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.45 Security. (1) REQUIREMENT. A dairy plant operator shall file security with the department under this section unless the operator meets the minimum financial standards under s. ATCP 100.40 or enters into a trusteeship under subch. V. A third party may provide security on behalf of a dairy plant operator.

(2) **APPROVED SECURITY.** Security filed with the department under this section is subject to approval by the department. The department may approve only the following types of security:

(a) A commercial surety bond that complies with sub. (3) (a).

(b) Cash, or certificates of deposit or money market certificates that comply with sub. (3) (b).

(c) Stocks, bonds or other marketable securities that comply with sub. (3) (c).

(d) Irrevocable bank letters of credit that comply with sub. (3) (d).

(e) Life insurance policies that comply with sub. (3) (e).

(3) **FORM OF SECURITY; REQUIRED TERMS AND CONDITIONS.** (a) *Commercial surety bonds.* A commercial surety bond filed as security with the department shall be all the following:

1. Made payable to the department for the benefit of producers selling milk to the dairy plant operator.

2. Issued by an insurer authorized to operate a surety business in this state.

3. Issued as a continuous term bond subject to cancellation only upon written agreement by the department, or upon written notice to the department received at least 90 days prior to the date of cancellation. Notice of cancellation shall be served on the department in person or by certified mail.

4. Issued in a form, and subject to any terms and conditions, that the department considers necessary or appropriate.

(b) *Certificates of deposit or money market certificates.* A certificate of deposit or money market certificate filed as security with the department shall be all of the following:

1. Issued or endorsed to the department, for the benefit of producers selling milk to the dairy plant operator, so that the certificate cannot be canceled or redeemed without the department's written authorization, and so that the funds represented by the certificate cannot be transferred or withdrawn without the department's written authorization.

2. Issued for a period of at least one year.

3. Subject to automatic renewal without any action by the department.

4. Issued in a form, and subject to any terms and conditions, that the department considers necessary and appropriate.

(c) *Stocks, bonds or other marketable securities.* A stock, bond, or other marketable security filed as security with the department shall be all of the following:

1. Issued or endorsed to the department for the benefit of producers selling milk to the dairy plant operator.

2. Valued for security purposes at current market value.

3. Readily convertible by the department into cash.

4. Subject to sale or redemption only with the department's written agreement.

5. Held by the department subject to any terms and conditions that the department considers necessary or appropriate.

(d) *Irrevocable bank letters of credit.* An irrevocable bank letter of credit filed as security with the department shall be all of the following:

1. Payable to the department for the benefit of producers selling milk to a dairy plant operator.

2. Issued on bank letterhead.

3. Issued for an initial period of one year.

4. Issued in a form that provides for automatic annual renewal unless, at least 90 days before the scheduled renewal date, the issuing bank gives the department written notice that the letter of credit will not be renewed. Written notice shall be served on the department in person or by certified mail.

5. Issued in a form, and subject to any terms and conditions, that the department considers necessary or appropriate.

(e) *Life insurance policies.* A life insurance policy filed as security with the department shall be all of the following:

1. Issued or endorsed to the department, for the benefit of producers selling milk to the dairy plant operator, so that if the policy is canceled or surrendered the cash surrender value of the policy is paid to the department.

2. Issued or endorsed to the department, for the benefit of producers selling milk to the dairy plant operator, so that the insurer cannot make any payment to policy beneficiaries unless the insurer first pays the equivalent of the policy's cash surrender value to the department, or the department agrees to waive payment of the cash surrender value.

3. Issued or endorsed to the department, for the benefit of producers selling milk to the dairy plant operator, so that the department can require that the policy be surrendered and the cash surrender value paid to the department for the benefit of producers pursuant to s. ATCP 100.65.

4. Valued for security purposes at cash surrender value.

5. Issued in a form, and subject to any terms and conditions, that the department considers necessary or appropriate.

(4) **DEPARTMENT CUSTODY OF SECURITY.** The department or department's agent shall hold under its custody any security filed under this section. Security shall be held for the benefit of producers and may be used under s. ATCP 100.65 to pay producer claims allowed under s. ATCP 100.60.

(5) **AMOUNT OF SECURITY.** Security under this section shall be in an amount equal to at least 75% of the dairy plant operator's maximum liability to producers. The operator's maximum liability to producers is calculated as follows:

(a) Divide the maximum producer payroll reported to the department under s. ATCP 100.20 by the number of days in the payroll period.

(b) Multiply the quotient under par. (a) by the sum of the following:

1. The number of days in the payroll period.

2. The number of calendar days between the end of the payroll period and the date on which the dairy plant operator pays for milk delivered during the payroll period.

(c) From the product obtained under par. (b), subtract any advances made by the dairy plant operator to producers as reported under s. ATCP 100.20. The remainder is the operator's maximum liability to producers.

(6) **DEMANDS FOR SECURITY.** (a) The department may require a dairy plant operator to provide security at any time if any of the following occurs:

1. The dairy plant operator no longer meets the financial standards under s. ATCP 100.40.

2. The dairy plant operator's existing security falls below the amounts required under sub. (4) because of depreciation in the value of the security filed with the department, an increase in maximum liability to producers, or the cancellation of any security filed with the department.

3. The dairy plant operator fails to provide relevant information requested by the department or required by department rules.

(b) If the department requires a dairy plant operator to provide security under par. (a), it shall issue a notice to the operator indicating why security is required, the amount of security required, and the deadline date for filing security. The security filing deadline shall be not more than 30 days after the date on which the department issues its demand for security. The department may extend the security filing deadline for up to 30 more days for cause. If the department extends the deadline it may require the dairy plant operator to file an alternative form of security, other than a form of security specified in sub. (2) or a trusteeship, in the interim. The department may reject alternative forms of security it finds unacceptable.

(c) If a dairy plant operator fails to file security by the final deadline date specified by the department under par. (b), the dairy plant operator shall, within 5 days after that final deadline date, notify all producers shipping milk to the dairy plant that the operator has failed to file security in response to the department's demand. If the operator fails to inform all producers within 5 days, or incorrectly informs producers, the department shall promptly notify all producers of the operator's failure to file security.

(d) If a dairy plant operator fails to file security with the department by the final deadline date specified by the department under par. (b), the secretary may issue a summary order under s. ATCP 100.10 (2) prohibiting the dairy plant operator from buying milk from producers.

(7) **RELEASE OF SECURITY.** The department may, upon written request by a dairy plant operator, release security filed under this section only if one of the following occurs:

(a) The dairy plant operator achieves and maintains for at least 2 consecutive fiscal years the minimum financial standards under s. ATCP 100.40.

(b) The dairy plant operator demonstrates, to the department's satisfaction, that the amount of security on file exceeds the amount required under this subsection, and the operator requests that the department release the excess security.

(c) The dairy plant operator files alternative security of equivalent value or enters into a trusteeship under subch. V.

(d) The dairy plant operator has gone out of business and certifies, to the department's satisfaction, that the operator has paid in full all producer claims.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; emerg. am. (4) (intro.), cr. (4m), eff. 5-1-91; renum. from Ag 8.45 and am. Register, November, 1992, No. 443, eff. 12-1-92; am. (2), (6) (a) 1. and 2. and (7) (intro.), r. (5), renum. (3) and (4) to be (4) and (5) and am. (4), cr. (3) and (6) (d), Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.48 Trusteeships. A dairy plant operator is not required to file security under s. ATCP 100.45 if the operator enters into a trusteeship under subch. V.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.48 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.50 Payment to producers; deadlines.

(1) FIRST MONTHLY PAYMENT. A dairy plant operator's payment to a milk producer for milk received from that producer during the first 15 days of the month shall be made before the 4th day of the following month. The payment shall be based on an estimated price that is at least 80% of the class III published by the regional federal milk market administrator for the month before the month in which the milk is received, or 80% of the price originally contracted for by the dairy plant operator and the milk producer, whichever is greater.

(2) SECOND MONTHLY PAYMENT. A dairy plant operator shall pay a milk producer the balance due for all milk received from that milk producer during the month, based on the actual price for that milk, before the 19th day of the following month.

Note: A dairy plant operator complies with a payment deadline under this section if the operator mails payment to the producer on or before the deadline date, or gives a check to the milk hauler for delivery to the producer on or before the deadline date.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.55 Dairy plant operators; notice to producers. (1) SEMIANNUAL NOTICE. (a) Twice each year, during the months of June and December, each dairy plant operator shall notify producers of the basis on which the dairy plant is licensed under this chapter. Notice shall:

1. Be issued in writing to all producers who ship milk to the dairy plant.

2. Be in the form of a separate document. The separate document shall be delivered with the producer's milk check or in a separate mailing or delivery.

3. Clearly and conspicuously set forth the information specified in sub. (2). No other information, except the dairy plant's name and address and the date, may appear on the document.

(b) The dairy plant operator shall file a copy of the notice with the department within 10 days after the operator issues the notice to producers.

(2) CONTENTS OF NOTICE. The semiannual notice under sub. (1) shall bear the conspicuous title "NOTICE TO PRODUCERS." The notice shall include the following information as applicable:

(a) Every notice shall contain the following verbatim statement, conspicuously printed under the title:

"Wisconsin law requires dairy plant operators to demonstrate a reasonable degree of financial responsibility to the Wisconsin Department of Agriculture, Trade and Consumer Protection. This law is designed to provide reasonable assurance that producers will be paid for their milk. However, it does not guarantee that producers will be paid. Each producer has some responsibility for determining the credit worthiness of the dairy plant to which the producer is selling milk. A dairy plant operator may qualify for a license by doing one of the following: (1) filing audited financial statements with the department showing that the dairy plant meets certain minimum financial standards; (2) filing security with the department equal to at least 75% of the operator's maximum reported liability to producers; or (3) establishing a dairy plant trusteeship under ch. ATCP 100, subch. V, Wis. Adm. Code."

(b) If a dairy plant operator is licensed on the basis of the operator's audited financial statement, the notice shall contain the following statement in addition to the statement under par. (a):

"(Name of dairy plant operator) is currently licensed on the basis of its audited financial statement. Our most recent year-end financial statement, audited by the firm of (auditor's name) meets the following minimum financial standards: (1) a current ratio of at least 1.25 to 1.00; (2) owner's equity equal to at least

35% of total assets; and (3) a cash flow to debt service ratio of at least 1.50 to 1.00."

(c) Except as provided under par. (d), if a dairy plant operator has filed security with the department under s. ATCP 100.45, the notice shall contain the following statement in addition to the statement under par. (a):

"(Name of dairy plant operator) has filed security with the department to secure payment to its producers. The amount of the security is equal to at least 75% of the maximum amount which we owed to producers at any time during the past year. The security we have filed is in the following form or forms: (specify forms of security)."

(d) If, on an interim basis under s. ATCP 100.45 (5), a dairy plant operator has filed security which is less than 75% of the operator's maximum liability to producers, the notice shall contain the following statement in addition to the statement under par. (a):

"Recent law changes have raised the minimum financial standards for dairy plants. (Name of dairy plant operator) met the old minimum standards but does not yet meet the new minimum standards for licensing based on our financial statement alone. On an interim basis, we have therefore filed security with the department to secure a portion of our obligations to producers. The amount of the security is equal to at least (insert applicable minimum percentage under s. ATCP 100.45 (5) (a)). The security we have filed is in the following form or forms: (specify forms of security)."

(e) If a dairy plant operator is covered by a trusteeship under subch. V, the notice shall contain the following statement in addition to the statement under par. (a):

"(Name of dairy plant operator) is currently covered by a dairy plant trusteeship under ch. ATCP 100, subch. V, Wis. Adm. Code. Under a trust agreement filed with the department, the trustee (name of trustee) collects all receipts for milk and dairy products sold by our dairy plant and deposits those receipts in a special bank account. From this account, the trustee pays producers for their milk shipments and transfers any remaining funds to the dairy plant operator."

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.55 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.56 Milk handlers; notice to producers.

(1) SEMIANNUAL NOTICE. A milk handler shall issue semiannual notices to producers under this section. Semiannual notices shall be issued during the months of June and December of each year.

(2) PRODUCERS ENTITLED TO NOTICE. A semiannual notice under sub. (1) shall be issued to all of the following milk producers:

(a) Every producer who delivers milk produced in this state to the custody of the milk handler who at the time of delivery is acting as a milk handler for that producer.

(b) Every producer whose milk, produced in this state, is subject to disposition by the milk handler pursuant to a contract between the producer and the handler.

(3) FORM AND CONTENTS OF NOTICE. The notice under sub. (1) shall be issued in writing, in the form of a separate document mailed to the producer. The notice shall bear the conspicuous title "NOTICE TO PRODUCERS." The notice shall contain the following verbatim statement, conspicuously printed under the title:

"Under Wisconsin law, dairy plant operators must meet minimum financial standards or file security with the Wisconsin Department of Agriculture, Trade and Consumer Protection. The dairy plant security law provides some financial protection for milk producers in this state who sell their milk to dairy plant operators, but it does not guarantee that those producers will be paid.

Financial standards and security requirements under the dairy plant security law apply only to dairy plant operators who buy milk from producers or their agents. The law does NOT regulate other milk handlers who receive producer milk and make payments to producers. If you deliver your milk to the custody of an

unregulated handler, the dairy plant security law does not secure the handler's payments to you.

(Name of milk handler) receives milk from you as an unregulated milk handler. Therefore, we are not subject to financial standards and security requirements under the dairy plant security law."

History: Cr. Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.57 Producer agents; requirements.

(1) QUALIFICATIONS. (a) No person may claim to be an agent of any producer, for purposes of s. 100.06, Stats., or this chapter, unless that person is responsible for doing all of the following pursuant to a written agency contract with that producer under sub. (2):

Note: 2001 Wis. Act 16 repealed s. 100.06, Stats.

1. Marketing that producer's milk.
2. Receiving and collecting payment for that producer's milk, either directly or through a trust fund established for the benefit of producers for whom that person serves as agent.
3. Paying the producer for the producer's milk, either directly or through a trust fund established for the benefit of producers for whom that person serves as agent.

(b) No person may claim to be an agent of any producer, for purposes of s. 100.06, Stats., or this chapter, if that person does any of the following:

Note: 2001 Wis. Act 16 repealed s. 100.06, Stats.

1. Buys or takes title to that producer's milk.
2. Pasteurizes or packages that producer's milk.
3. Manufactures any food or dairy product from that producer's milk.

(2) CONTRACT WITH PRODUCER. No person may claim to be an agent of any producer, for purposes of s. 100.06, Stats., or this chapter, unless that person has a written agency contract under this subsection with a producer identified under s. ATCP 100.01 (19) (a) or (b). The contract shall be signed by the producer and the producer agent, and the producer agent shall give the producer a copy of the signed contract. The contract shall clearly specify all of the terms and conditions under which the producer agent markets the producer's milk on behalf of the producer, including terms and conditions related to all of the following:

Note: 2001 Wis. Act 16 repealed s. 100.06, Stats.

- (a) Ownership or title to the milk.
- (b) The receipt and collection of payment for the milk.
- (c) Payment to the producer.

(3) SEMIANNUAL NOTICE TO PRODUCERS. (a) A producer agent shall, during June and December of each year, issue a semiannual notice to every producer in this state with whom the producer agent has a current contract under sub. (1) to market the producer's milk.

(b) The notice under par. (a) shall be issued in writing, in the form of a separate document mailed to the producer. The notice shall bear the conspicuous title "NOTICE TO PRODUCERS." The notice shall contain the following verbatim statement, conspicuously printed under the title:

"Under Wisconsin's dairy plant security law, a dairy plant operator who buys milk from producers or their agents must meet minimum financial standards or file security with the Wisconsin Department of Agriculture, Trade and Consumer Protection. The dairy plant security law provides some financial protection for milk producers who sell their milk to dairy plant operators, either directly or through an agent. However, the law does not guarantee dairy plant payments to producers or their agents. Wisconsin's dairy plant security law does not require producer agents to meet minimum financial standards or file security.

(Name of agent) does not buy milk from producers, but acts as an agent of producers in marketing their milk to dairy plant

operators. When we market your milk to a Wisconsin dairy plant, that milk is covered by Wisconsin's dairy plant security law, and we are authorized to file claims and receive payment on your behalf. However, the dairy plant security law does not regulate, assure or guarantee our payments to you. Each producer has some responsibility to determine the credit worthiness of the dairy plant or agent to whom the producer entrusts his or her milk."

(4) NOTICE TO DAIRY PLANT OPERATORS. Whenever a producer agent ships or directs the shipment of producer-owned milk to a dairy plant in this state pursuant to a sales contract with the dairy plant operator, the sales invoice for that shipment shall notify the dairy plant operator that the producer agent is selling that milk as an agent of the producers who own the milk.

(5) REPORTS. A producer agent shall file with the department, on or before the 25th day of each month, a written report indicating all of the following:

- (a) The dairy plant operators to whom the producer agent sold milk on behalf of producers during the preceding month.
- (b) The total amount of milk, in pounds, which the producer agent sold to each dairy plant operator identified under par. (a) and the sale price for that milk.

History: Cr. Register, March, 1994, No. 459, eff. 4-1-94; renum. (2) to (4) to be (2) to (5), Register, February, 1996, No. 482, eff. 3-1-96.

Subchapter III — Collection of Producer Claims

ATCP 100.60 Producer claims; default proceedings.

(1) FILING CLAIMS. If a producer claims that a dairy plant operator has failed to pay for milk when due, the producer may file a written claim with the department. Upon receipt of a producer claim or other evidence of dairy plant default, the department may initiate a default proceeding under this section. Before initiating a default proceeding, the department may conduct a preliminary investigation as provided under s. 93.16, Stats.

(2) INITIATING DEFAULT PROCEEDINGS. To initiate a default proceeding, the department shall issue an order requiring all interested producers to file verified proofs of producer claims with the department before a specified date or be barred from participating in any recovery obtained by the department. The department shall publish the order as follows:

- (a) By posting a copy of the order in a prominent location at the dairy plant.
- (b) By mailing a copy of the order to the dairy plant operator and to the trustee or surety, if any.
- (c) By publishing the contents of the order as a class 3 notice under ch. 985, Stats. The last date of publication shall be at least 30 days before the deadline date for filing claims.

(d) If, based on the dairy plant operator's records or other information, the department obtains the names and addresses of other producers who appear to have unpaid producer claims against the dairy plant operator, by mailing a copy of the order or equivalent notice to each of those producers. In its notice the department may indicate the amount of the producers' apparent claims and ask the producers to verify or correct the amounts on or before the claim filing deadline.

(e) By any additional method the department considers necessary.

(3) AUDIT; PROPOSED ORDER. If the department initiates a default proceeding, it shall audit producer claims filed with the department and shall issue a proposed order allowing or disallowing claims. The proposed order shall be based on proposed findings of fact and conclusions of law, which shall accompany the proposed order. The department shall mail a copy of the proposed order to the dairy plant operator, to the trustee or surety, if any, and to every producer who filed a timely producer claim.

(4) CLAIMS DISALLOWED. The department shall disallow all of the following:

(a) A producer claim filed after the deadline date specified under sub. (2) unless the department, in writing, waives the deadline date for good cause shown.

(b) A producer claim for payment that was due more than 30 days before the date on which the department received the first written notice of default.

(c) A producer claim for milk that was voluntarily delivered to the dairy plant more than 10 days after the dairy plant operator first failed to pay the producer for milk when payment was due, while that payment was still due.

Note: Paragraph (c) defines transactions which constitute a "voluntary extension of credit," claims for which are barred under s. 100.06 (4), Stats. (2001 Wis. Act 16 repealed s. 100.06, Stats.)

(5) NOTICE AND HEARING. The department shall hold a public hearing on its proposed order under sub. (3). The department shall issue a notice of hearing to each person who is required to receive a copy of that order. The notice of hearing shall comply with s. 227.44, Stats. The notice of hearing may require affected parties to file objections to the proposed order, if any, in writing before the date of hearing. The hearing examiner may hold a prehearing conference before the hearing and may reschedule or continue the hearing as necessary. The hearing and related proceedings shall be conducted under ch. 227, Stats., and ch. ATCP 1.

(6) FINAL ORDER AFTER HEARING. Before issuing its final decision and order, the department shall follow the procedures prescribed under s. 227.46, Stats., except that if after the hearing under sub. (5) no objections remain to the proposed order, the department may adopt the proposed order as its final decision and order without further notice or hearing.

(7) INTEREST ON CLAIMS. (a) If the department's proposed or final order allows a producer claim, the order shall also require the dairy plant operator to pay interest on the claim. The department shall determine the interest rate to be paid to producers injured by a dairy plant default as the rate awarded by Wisconsin courts for interest on verdicts, established in s. 814.04 (4), Stats., unless the interest rate is determined in accordance with par. (b).

(b) The department shall apply the interest rate previously agreed upon by a producer and a dairy plant operator if a producer or dairy plant operator provides proof of either of the following:

1. A producer and a dairy plant operator have executed a written contract specifying the interest rate.
2. A producer has delivered a written confirmation of purchase to a dairy plant operator, specifying the interest rate, and the dairy plant operator failed to make a written objection within 10 days of receipt of the confirmation of purchase.

(c) A producer may waive payment of interest only if all of the following requirements are satisfied:

1. The waiver is in writing.
2. The waiver contains a written acknowledgement that the producer is aware of his or her right to payment of interest under s. 100.06 (4), Stats.

Note: 2001 Wis. Act 16 repealed s. 100.06, Stats.

3. The producer has signed and dated the waiver.
4. The producer or dairy plant operator submits the waiver to the department at, or any time after, the time the producer submits his or her claim.

(d) The department shall compute the amount of interest due a producer by applying the interest rate determined under par. (a) or (b), commencing from the first day of a breach in payment by a dairy plant operator until full payment of a producer's allowed claim is made. If an allowed claim is not paid in full within the time period specified in the department's final order allowing producer claims, interest shall continue to accrue on the balance of the unpaid claim. Interest payments may be made concurrently with payment of an allowed claim, or within a reasonable period of time subsequent to payment of an allowed claim.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.60 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.65 Payment of secured claims. If the department issues a final order allowing producer claims under s. ATCP 100.60, the department may convert any security it holds under s. ATCP 100.45 and may apply the proceeds to pay the allowed claims. The department shall distribute available funds to the producer claimants on a proportionate basis, according to the amount of each allowed producer claim. If funds exceed allowed claims, the excess shall be returned to the person who filed security with the department.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.65 and am. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.70 Department collection of producer claims. The department may demand and receive payment of claims allowed under s. ATCP 100.60 on behalf of producers and may commence an action in court to recover allowed claims on behalf of producers. Any amounts the department recovers it shall distribute to producer claimants on a proportionate basis, according to the amount of each producer's allowed claim. The department may settle any producer claim with the consent of the producer and may decline to pursue a claim on behalf of a producer who does not agree to a settlement recommended by the department. Any producer may also proceed independently to recover an unpaid claim.

History: Cr. Register, February, 1991, No. 422, eff. 5-1-91; renum. from Ag 8.70, Register, November, 1992, No. 443, eff. 12-1-92.

Subchapter IV — Dairy Plant Payroll and Records

ATCP 100.75 Payroll statements to milk producers. On each producer pay date, a dairy plant operator shall provide each producer with a written payroll statement that includes all of the following information:

(1) OPERATOR IDENTIFICATION. A producer's payroll statement shall include the name and address of the dairy plant operator.

(2) PRODUCER IDENTIFICATION. A producer's payroll statement shall include the producer's name and identification number.

(3) PAY PERIOD. A producer's payroll statement shall specify the milk delivery dates, or pay period, for which payment is being made.

(4) MILK VOLUME. A producer's payroll statement shall specify the total weight of milk, in hundredweights, which the dairy plant operator received from the producer during the pay period.

(5) GRADE OF MILK. A producer's payroll statement shall specify the grade of milk which the dairy plant operator received from the producer during the pay period.

(6) MILK TEST RESULTS. If the price paid to the producer is affected by test results related to milk components, milk quality or other variables, the producer's payroll statement shall include a statement of all test results used to determine the pay price unless the dairy plant operator has already furnished those test results to the producer.

(7) MILK PRICE AND ADJUSTMENTS. A producer's payroll statement shall include the following price information, as applicable:

(a) *Payment based on straight fat.* If the dairy plant operator is paying the producer on a straight fat basis, the producer's payroll statement shall include all of the following information:

1. The butterfat content of milk received from the producer during the pay period, expressed as a percentage by weight of milk received.

2. The total pounds of butterfat in the milk received from the producer during the pay period.

3. The pay price per pound of butterfat.

4. The gross amount paid for butterfat, obtained by multiplying the total pounds of butterfat under subd. 2. by the pay price under subd. 3.

5. The pay price per hundredweight for butterfat, obtained by dividing the gross amount paid for butterfat under subd. 4. by the milk volume in hundredweights under sub. (4).

6. Price adjustments per hundredweight for other milk components such as protein or solids not fat.

7. Price adjustments per hundredweight for milk grade or quality, including adjustments for bacteria or somatic cell counts.

8. Price adjustments per hundredweight based on volume or other factors identified on the payroll statement.

9. The producer's average gross pay per hundredweight of milk, obtained by applying the adjustments under subds. 6. to 8. to the pay price per hundredweight for butterfat under subd. 5.

(b) *Payment based on 3.5% butterfat differential.* If the dairy plant operator is paying the producer on a 3.5% butterfat differential basis, the producer's payroll statement shall include all of the following information:

1. The base price per hundredweight for milk containing 3.5% butterfat by weight.

2. The price differential per hundredweight for each percentage point, plus or minus, by which the butterfat content of the producer's milk differs from 3.5%.

3. Price adjustments per hundredweight for other milk components such as protein or solids not fat.

4. Price adjustments per hundredweight for milk grade or quality, including adjustments for bacteria or somatic cell counts.

5. Price adjustments per hundredweight based on volume or other factors identified in the producer's payroll statement.

6. The producer's average gross pay per hundredweight of milk after adjustments under this subsection.

(c) *Payment based on multiple component pricing.* If the dairy plant operator is paying the producer on a multiple component pricing basis, the producer's payroll statement shall include all of the following information:

1. The milk volume in hundredweights under sub. (4) multiplied by the applicable producer price differential per hundredweight.

Note: Federal milk marketing orders specify, for each pay period, minimum producer price differentials for grade A milk covered by those orders.

2. The pounds of butterfat contained in the milk received from the producer during the pay period, multiplied by the applicable butterfat price per pound.

Note: Federal milk marketing orders specify, for each pay period, minimum butterfat prices for grade A milk covered by those orders.

3. The pounds of protein contained in the milk received from the producer during the pay period, multiplied by the applicable protein price per pound.

Note: Federal milk marketing orders specify, for each pay period, minimum protein prices for grade A milk covered by those orders.

4. The pounds of other solids contained in the milk received from the producer during the pay period, multiplied by the applicable price per pound for other solids.

Note: Federal milk marketing orders specify, for each pay period, minimum "other solids" prices for grade A milk covered by those orders.

5. For each applicable price adjustment based on milk grade or quality, the milk volume in hundredweights under sub. (4) multiplied by the price adjustment per hundredweight. The producer's payroll statement shall identify the basis for each price adjustment under this subdivision.

Note: This includes price adjustments for bacteria count, somatic cell count, or other measures of grade or quality. Federal milk marketing orders specify, for each pay period, minimum somatic cell adjustments for grade A milk covered by those orders.

6. For each applicable price adjustment based on volume or other factors, the milk volume in hundredweights under sub. (4) multiplied by the price adjustment per hundredweight. The producer's payroll statement shall identify the basis for each price adjustment under this paragraph.

7. The producer's average gross pay per hundredweight of milk, calculated as the sum of the values under subds. 1. to 6., divided by the milk volume in hundredweights under sub. (4).

(8) **GROSS AMOUNT DUE.** A producer's payroll statement shall specify the gross amount due the producer for the pay period, prior to any deductions under sub. (11).

(9) **AVERAGE GROSS PAY PER HUNDREDWEIGHT LESS HAULING CHARGES.** A producer's payroll statement shall specify the producer's average gross pay per hundredweight less hauling charges. This consists of the gross amount due under sub. (8) less total hauling expenses charged to the producer for the pay period under sub. (11) (a), divided by the milk volume in hundredweights under sub. (4).

(10) **NET AMOUNT DUE.** A producer's payroll statement shall specify the net amount due the producer for the pay period. This consists of the gross amount due under sub. (8) less all deductions under sub. (11).

(11) **DEDUCTIONS.** A producer's payroll statement shall specify the nature and amount of every deduction from the gross amount due the producer under sub. (8), including deductions for any of the following which may apply:

(a) Milk hauling expenses charged to the producer.

(b) Deductions related to drug residue violations.

(c) Dairy products which the producer buys from the dairy plant operator.

(d) Supplies which the dairy plant operator provides to the producer.

(e) Wisconsin milk marketing board deductions.

(f) National dairy promotion deductions.

(g) Commodity credit corporation deductions.

(h) Insurance deductions.

(i) Cooperative fees or capital retained.

(j) Creditor assignments.

(k) Other deductions.

History: Cr. Register, November, 1992, No. 443, eff. 6-1-93; r. and recr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.76 Dairy plant records. A dairy plant operator shall keep accurate records and accounts of milk receipts, payments for milk received, and amounts owed to milk producers. Records shall include all of the following:

(1) A copy of every contract between the dairy plant operator and a milk producer.

(2) A record of all milk receipts from producers, showing the amount received from each producer and the date of each receipt.

(3) A copy of every individual milk producer payroll statement under s. ATCP 100.75.

(3m) Records showing the nature and amount of any non-price consideration which the operator furnishes to a producer in return for the producer's sale of milk to the operator, but which is not reflected in that producer's payroll statements under s. ATCP 100.75. In this subsection, "non-price consideration" has the meaning given in s. ATCP 100.98 (8).

(4) The result of every test performed on a producer milk delivery, including any test related to milk components or milk quality. Records shall specify the milk delivery to which each test result pertains.

(5) A payroll summary showing, for each payroll period, the amount of milk received from producers, the gross amounts owed to producers for milk received, the amount and disposition of any payroll deductions, the net amounts owed to producers after deductions, and the amounts paid to producers.

(6) Other computer records, worksheets and accounting records showing how the dairy plant operator computed payroll obligations.

(7) Records showing the dairy plant operator's use and disposition of milk and dairy products received by the operator. Records shall enable the dairy plant operator to do both of the following:

(a) Account for the sale, use or disposition of all milk and dairy products received by the operator.

(b) Account for the source of all milk and dairy products sold or otherwise disposed of by the dairy plant operator.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92; cr. (3m), Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.77 False records. (1) No dairy plant operator may falsify any record or account, or conspire with any other person to falsify a record or account.

(2) No dairy plant operator may provide any producer with any statement or accounting which is false or misleading, or which contains any false or misleading computation or arrangement of figures.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.78 Retaining records; inspection by department. A dairy plant operator shall retain the records required under s. ATCP 100.76 for a period of 3 years and shall make them available for inspection and copying by the department upon request.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

Subchapter V — Dairy Plant Trusteeships

ATCP 100.85 Trusteeship; general. A dairy plant operator is not required to file security under s. ATCP 100.45 if the dairy plant operator is operating under a valid trusteeship established in compliance with this subchapter. The trusteeship shall be managed by an independent trustee who shall exercise exclusive control over the dairy plant operator's milk receipts, and over the products and proceeds of those receipts, to secure payment to milk producers.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.86 Trust agreement. (1) GENERAL. A trusteeship shall be created by a written trust agreement. The trust agreement shall be prepared in a form prescribed by the department, and shall be signed by the dairy plant operator and a trustee approved under s. ATCP 100.87. The trust agreement shall comply with applicable requirements under this subchapter.

(2) APPROVAL; EFFECTIVE DATE. A trust agreement is not valid, for purposes of this chapter, unless it is approved in writing by the department. The department's approval does not take effect until all of the following have occurred:

(a) The trust agreement is signed by the dairy plant operator and the trustee.

(b) The department approves the trustee under s. ATCP 100.87 (4).

(c) The trustee files a performance bond with the department, in compliance with s. ATCP 100.88 (4).

(d) The trustee obtains and perfects a security interest as required by s. ATCP 100.89 (1) and (2), and files documentation with the department as required under s. ATCP 100.89 (5).

(e) The dairy plant operator certifies to the trustee and the department that the operator has notified the operator's current account debtors as required by s. ATCP 100.91 (4).

Note: A trust agreement may be binding on the parties to that agreement, even though it does not constitute a valid trust agreement for purposes of this chapter. If a trust agreement is not valid for purposes of this chapter, the dairy plant operator must comply with the security requirements under s. ATCP 100.45.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.87 Trustee; approval and replacement. (1) APPLICATION. A prospective trustee shall file a trustee application with the department on a form provided by the department. The application shall include all of the following:

(a) The identity and address of the prospective trustee.

(b) The prospective trustee's qualifications under s. ATCP 100.88 (1) to (3).

(c) Proof that the prospective trustee has been approved by producers as provided under sub. (2).

(d) A trustee performance bond complying with s. ATCP 100.88 (4).

(e) Other relevant information required by the department.

(2) APPROVAL BY PRODUCERS. Before the department approves a trustee under sub. (4), the trustee shall be approved by producers who will be covered by the proposed trusteeship. Producer approval may be signified in either of the following ways:

(a) By majority vote of producers present at a meeting called for the purpose of approving a trustee. The dairy plant operator shall give every affected producer reasonable advance notice of the scheduled meeting. The person presiding at the meeting shall submit a sworn and notarized statement, on a form provided by the department, certifying the approval of the trustee.

(b) By a petition, signed by a majority of producers who will be covered by the proposed trusteeship, indicating that the signing producers approve the trustee identified in the petition. The dairy plant operator shall submit with the petition a sworn and notarized statement stating that the producers signing the petition constitute a majority of the producers who ship milk to the dairy plant operator.

(3) PRODUCER AGENT; VOTING STATUS. If a producer agent delivers milk to a dairy plant operator on behalf of producers, and if the agent qualifies as a producer under s. ATCP 100.01 (19) (c), that agent may cast one vote as a producer under sub. (2) (a), or may sign a petition under sub. (2) (b) as an individual producer. Producers whose milk is delivered to a dairy plant operator by an agent who qualifies as a producer under s. ATCP 100.01 (19) (c) may not cast votes as producers under sub. (2) (a), nor may they sign a petition as producers under sub. (2) (b).

(4) APPROVAL BY DEPARTMENT. Within 20 days after the department receives a complete application under sub. (1), the department shall approve or disapprove the prospective trustee.

(5) REMOVAL. (a) The department may, by written notice, withdraw its approval of a trustee if the department determines either of the following:

1. The trustee has not performed the trustee's obligations under this subchapter, or is not capable of performing those obligations.

2. A majority of producers covered by a trusteeship have signed a petition for the removal of the trustee.

(b) If the department withdraws its approval of a trustee under par. (a), the department may issue a written notice declaring that the trusteeship is no longer valid for purposes of this chapter.

Note: A notice under sub. (5) (a) or (b) may be issued by the administrator of the department's trade and consumer protection division, or by the administrator's designee. A person adversely affected by a notice under sub. (5) (a) or (b) may request a hearing before the department on the notice. A request for hearing does not stay the effective date of the notice.

(6) RESIGNATION. If a trustee resigns, the trustee shall give reasonable advance notice before the resignation becomes effective, so that a new trusteeship can be created prior to the effective date of the resignation.

(7) INTERIM TRUSTEE. If a trustee resigns, dies, becomes incapacitated, or is removed by the department, the department may act as interim trustee, pending the creation of a new trusteeship. While acting as interim trustee, the department may exercise all of the powers of a trustee under this subchapter.

(8) INTERIM TRUSTEE. If a trustee resigns, dies, becomes incapacitated, or is removed by the department, either the trustee, the trustee's successor in interest, or a person exercising power of attorney on behalf of the trustee shall promptly assign the trustee's security interest under s. ATCP 100.89 to the department as interim trustee, or to a replacement trustee approved by the department.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.88 Trustee qualifications; performance bond. (1) GENERAL. A trustee may be either of the following:

- (a) A natural person who is an adult resident of this state.
- (b) A firm or corporation having trust powers and offices in this state.

(2) NO OWNERSHIP OR FINANCIAL INTEREST IN DAIRY PLANT. (a) A trustee may not have any ownership interest in the dairy plant operation. This does not prohibit a producer member of a cooperative organized under ch. 185, Stats., from serving as trustee for a dairy plant owned by that cooperative.

(b) Neither a trustee nor a trustee's employer may have any notes or accounts receivable from the dairy plant operator that collectively exceed 5% of the dairy plant operator's total liabilities.

(c) A trustee may not be an employee of the dairy plant operator.

(3) KNOWLEDGE AND EXPERIENCE. A trustee shall document, to the department's satisfaction, that the trustee has adequate knowledge and experience related to accounting and dairy plant operations to perform the trustee's obligations under this subchapter.

(4) PERFORMANCE BOND. (a) A trustee shall secure and file with the department a performance bond, written by an insurer authorized to operate a surety business in this state. The bond shall secure the trustee's faithful performance of the trustee's obligations under this subchapter.

(b) The bond under par. (a) shall be all of the following:

1. Issued on a continuous basis subject to cancellation only with the department's written agreement, or upon written notice received by the department at least 90 days prior to the date of cancellation. Notice shall be served on the department in person or by certified mail.

2. Issued for an amount not less than 75% of the dairy plant operator's maximum liability to producers.

3. Issued in a form, and subject to any terms and conditions, that the department considers necessary or appropriate.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92; except (2) eff. 6-1-93; am. (4) (b), Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.89 Security interest. (1) REQUIREMENT. To secure payment of a dairy plant operator's obligations to milk producers, the dairy plant operator shall grant the trustee a first priority security interest in all of the operator's inventories of milk and dairy products, and in all proceeds and accounts receivable from the sale and disposition of milk and dairy products. The security agreement shall be prepared in a form prescribed by the department, and shall be approved by the department.

(2) PERFECTED BY FILING. The trustee shall perfect the security interest under sub. (1) by filing according to ch. 409, Stats.

(3) SECURITY INTEREST PRIORITY. (a) A trustee shall exercise reasonable diligence to ensure that the security interest granted to the trustee under this section takes priority over every other security interest in the collateral. A trustee may not subordinate the trustee's security interest under this section to any other security interest in the collateral.

(b) A dairy plant operator may not grant any other security interest in the operator's inventories of milk or dairy products, or in the proceeds or accounts receivable from the sale or disposition of milk or dairy products, which has priority over the trustee's security interest under this section.

(4) OTHER SECURITY INTERESTS IN THE COLLATERAL; APPROVAL BY TRUSTEE AND DEPARTMENT. A dairy plant operator may not grant any other security interest in the operator's inventories of milk or dairy products, or in the proceeds or accounts receivable from the sale or disposition of milk or dairy products, without prior written approval from the trustee and the department. The trustee or the department may deny approval.

(5) TRUSTEE TO FILE DOCUMENTATION WITH DEPARTMENT. The trustee shall file documentation with the department showing that the trustee has perfected the security interest under this section in compliance with sub. (2). The trustee shall annually certify to the department that the security interest has priority over every other security interest in the collateral.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.90 Proceeds from sale of milk and dairy products; paid to trust account. Under a trusteeship, all proceeds from the dairy plant operator's sale of milk and dairy products shall be paid to a trust account established under s. ATCP 100.93. Proceeds from sales on account shall be paid to the trust account in compliance with s. ATCP 100.91. Proceeds from cash sales shall be deposited to the trust account in compliance with s. ATCP 100.92. The trustee shall distribute funds from the trust account in compliance with s. ATCP 100.94.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.91 Sales on account; account debtor to pay trustee. (1) NOTICE TO ACCOUNT DEBTOR.

(a) Under a trusteeship, whenever a dairy plant operator sells milk or dairy products on account, the dairy plant operator shall direct the account debtor to remit payment directly to the trustee, and not to the dairy plant operator. The dairy plant operator shall include a notice to this effect in every contract, and in every invoice, shipping manifest or bill of lading related to the sale of milk or dairy products on account.

(b) A dairy plant operator's notice to an account debtor under par. (a) shall direct the account debtor to remit payments to the lock box for the trust account under s. ATCP 100.93. The notice shall include the lock box number and address.

(2) DAIRY PLANT OPERATOR MAY NOT ACCEPT DIRECT PAYMENTS FROM ACCOUNT DEBTORS. Under a trusteeship, a dairy plant operator may not accept a direct payment from an account debtor in connection with the operator's sale of milk or dairy products to that account debtor. Payments by account debtors shall be directed to the trustee, as provided under sub. (1).

(3) INITIAL IDENTIFICATION OF ACCOUNTS RECEIVABLE. Prior to the effective date of a trusteeship, the dairy plant operator shall provide the trustee with copies of all of the dairy plant operator's current accounts receivable for milk and dairy products, including the name and address of the account debtor, and the amount receivable for each sale of milk or dairy products. In connection with each sale of milk or dairy products, the account receivable shall also indicate the dates of the producer milk deliveries from which the milk or dairy products were made.

(4) INITIAL NOTICE TO ACCOUNT DEBTORS; CERTIFYING COMPLIANCE. Prior to the effective date of a trusteeship, the dairy plant operator shall certify in writing, to the trustee and the department, that the dairy plant operator has instructed each of the operator's current account debtors to remit all future payments for milk and dairy products to the trustee, as provided under sub. (1).

(5) SALE DOCUMENTS. Whenever the dairy plant operator sells milk or dairy products on account, the dairy plant operator shall provide the trustee with a copy of every sale contract, invoice, shipping manifest, bill of lading, or other document which specifies the terms and conditions of sale or evidences the sale. Sale documents shall provide sufficient information so that the trustee can determine the dates of the producer milk deliveries from which the milk or dairy products were made.

(6) OFFSETS AGAINST ACCOUNT OBLIGATIONS. (a) Under a trusteeship, a dairy plant operator may not authorize or accept, as payment for goods or services provided by an account debtor, any offset against the operator's account receivable from that account debtor for milk or dairy products sold to the account debtor.

(b) Under a trusteeship, if a dairy plant operator sells milk or dairy products to an employee, the dairy plant operator may not deduct the sale price from the employee's salary or wages unless

the operator makes an equivalent cash payment to the trustee. The dairy plant operator shall make the cash payment within the same week that the employee payroll deduction is made.

(c) If a dairy plant operator sells dairy products to a milk producer, the dairy plant operator may deduct the sale price from the dairy plant operator's producer payroll obligation to that producer without making an equivalent cash payment to the trustee.

(7) **TRUSTEE MAY PROHIBIT SALES.** A trustee may, by written notice, prohibit the dairy plant operator from selling milk or dairy products to an account debtor if the account debtor has not made payments on a timely basis, or if the trustee has good reason to believe that the account debtor will not make payments on a timely basis.

(8) **TRUSTEE TO REVIEW COMPLIANCE.** The trustee shall, at least monthly, review the dairy plant operator's sales contracts, accounts and records to determine whether the operator is complying with this section.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.92 Cash sales; dairy plant operator to remit proceeds to trustee. (1) **GENERAL.** Whenever a dairy plant operator makes a cash sale of milk or dairy products, either to a retail or wholesale purchaser, the dairy plant operator shall remit the entire proceeds of the cash sale to the trustee.

(2) **WEEKLY DEPOSITS.** By the end of each week, the dairy plant operator shall remit to the trustee the accumulated proceeds of cash sales made by the operator during that week. The operator shall deposit the proceeds to the lock box for the trust account under s. ATCP 100.93. For purposes of s. ATCP 100.94, these cash deposits are considered proceeds of milk delivered by producers during the pay period in which the deposits are made.

(3) **TRUSTEE TO MONITOR COMPLIANCE.** The trustee shall review the dairy plant operator's sales accounts and records to determine whether the operator is complying with this section.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.93 Trust account. (1) **TRUSTEE TO ESTABLISH ACCOUNT.** For each trusteeship, the trustee shall open and maintain a separate trust account. The trust account shall be identified as follows: "Trust account for (name of dairy plant operator) and producers shipping milk to (name of dairy plant operator); (name of trustee), Trustee." The trustee shall also arrange for a lock box to receive deposits to the trust account.

(2) **DEPOSITS TO TRUST ACCOUNT.** All proceeds from the dairy plant operator's sale of milk and dairy products, and all funds borrowed by the trustee under s. ATCP 100.95, shall be deposited to the trust account. Deposits shall be made to the bank lock box for that account.

(3) **CHECKS WRITTEN ON TRUST ACCOUNT.** (a) *Persons authorized to write checks.* The following persons, and no others, shall be authorized to write checks on the trust account:

1. The trustee.
2. If the department assumes responsibility as interim trustee under s. ATCP 100.87 (6), an authorized representative of the department.

(b) *To whom payable.* Checks written on the trust account may be made payable to the following persons in compliance with this subchapter, and to no other persons:

1. To producers for milk shipped to the dairy plant operator, or to the assignees of those producers.
2. To the dairy plant operator.

(c) *Trustee to keep record.* The trustee shall keep a current record of all checks written on the trust account. For each check written on the account, the record shall identify the check number, the date on which the check was written, the person to whom the check was made payable, and the amount of the check. The trustee's check records shall be reconciled at least monthly with the bank's account records.

(d) *Checks imprinted with trustee name and address.* All checks written on the trust account shall be imprinted with the name and address of the trustee, identified as trustee for (name of dairy plant).

(4) **RECORD OF ACCOUNT BALANCE.** The trustee shall keep a current, up-to-date record of the trust account balance. At least monthly, the trustee shall reconcile the bank's record of account balances with the trustee's records.

(5) **ADEQUATE BALANCE.** The trustee shall monitor the adequacy of the trust account balance in relation to the dairy plant operator's producer payroll obligations. If the trust account balance is insufficient to meet a dairy plant operator's producer payroll obligations when due, in compliance with s. ATCP 100.94, the trustee shall immediately notify the department and the bonding company which issued the trustee's performance bond under s. ATCP 100.88 (4).

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92; am. (1), Register, March, 1994, No. 459, eff. 4-1-94.

ATCP 100.94 Trustee payments to producers and dairy plant operator. (1) **GENERAL.** The trustee shall distribute cash proceeds from the trust account under s. ATCP 100.93 in compliance with this section. For purposes of this section, "cash proceeds" means all moneys which have been deposited to the trust account under ss. ATCP 100.91, 100.92 and 100.95, and which are available for distribution by the trustee.

(2) **TIMELY PAYMENTS TO PRODUCERS.** To the extent permitted under this section, the trustee shall make timely payment of the amounts due to producers for milk delivered to the dairy plant operator. Payments shall be made in compliance with this section. If available cash proceeds are not adequate to pay producers in full, the trustee shall distribute the available cash proceeds to producers on a pro rata basis.

(3) **APPLYING PROCEEDS BY PAY PERIOD; GENERAL.** Cash proceeds from milk delivered during each pay period shall be applied first to pay producers for the milk delivered during that pay period. To the extent that proceeds from milk delivered during any pay period exceed the dairy plant operator's producer payroll obligations for that pay period, the trustee may apply the excess proceeds to satisfy any unpaid obligations for producer milk delivered during a prior pay period. The trustee may not use cash proceeds from milk delivered during any pay period to pay for milk delivered during a prior pay period, except as provided under this subsection.

(4) **DISTRIBUTING EXCESS CASH PROCEEDS TO DAIRY PLANT OPERATOR.** If cash proceeds from milk delivered during any pay period exceed the amounts owed to producers for milk delivered during that pay period and all prior pay periods, the trustee may distribute the excess proceeds to the dairy plant operator. The trustee may not distribute cash proceeds to the dairy plant operator except as provided under this subsection.

(5) **RETAINING EXCESS PROCEEDS.** Rather than distribute excess proceeds under sub. (4) to the dairy plant operator, the trustee may retain those excess proceeds and use them to pay producers for milk delivered during a subsequent pay period if, in the trustee's judgment, such action is necessary to meet the dairy plant operator's payroll obligations.

(6) **CASH PROCEEDS AVAILABLE FOR DISTRIBUTION; DETERMINATION BY TRUSTEE.** Before distributing any cash proceeds from the trust account, the trustee shall determine the pay period to which those proceeds are attributable, and shall determine the amounts available for distribution to producers and the dairy plant operator in compliance with this subsection. The determination under this subsection shall be made in writing. The trustee shall keep a copy of each determination under this subsection for at least 3 years.

(7) **PRODUCER PAYMENTS BASED ON DAIRY PLANT PAYROLL RECORD.** (a) The trustee shall pay producers based on the dairy plant operator's producer payroll record. The operator's producer payroll record shall accurately reflect the amount of milk delivered by

each producer, the pay price, and the pay adjustments and terms agreed upon between the producer and the dairy plant operator. The trustee shall review each payroll to determine whether payroll computations appear to be accurate, based on information available to the trustee.

(b) The dairy plant operator shall provide the trustee with a timely and accurate producer payroll, so that the trustee can make timely payment to producers under this section. The dairy plant operator shall also provide the trustee with any information the trustee may need to verify the accuracy of a producer payroll.

Note: If a dairy plant operator receives milk from a producer agent who qualifies as a producer under s. ATCP 100.01 (19) (c), amounts due that producer agent for producer milk delivered to the dairy plant operator must be included in the producer payroll under this subsection.

(8) **ADVANCE PAYMENTS.** The trustee shall not advance any payment to a producer, except pursuant to an agreement between the producer, the trustee and the dairy plant operator. The amount advanced to a producer may not exceed the reasonable accrued value of the milk which the producer delivered to the dairy plant operator prior to the date of the advance payment.

(9) **RECORD OF PAYMENTS.** (a) The trustee shall keep a record of every payment to producers, showing the amount paid to each producer and the basis for each payment. The record of each payment shall be kept for at least 3 years after the payment is made.

(b) The trustee shall keep a record of every payment to the dairy plant operator, showing the amount of each payment and the basis for each payment. The record of each payment shall be kept for at least 3 years after the payment is made.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.95 Short-term borrowing by trustee; accounts receivable as security. (1) **AUTHORITY TO BORROW.** If, because of the normal time allowed for payment of accounts receivable, there is a temporary shortage of cash proceeds in the trust account to meet producer payroll obligations when due, the trustee may obtain a short-term loan to remedy the temporary shortage. The trustee may not borrow more than the amount reasonably required to meet producer payroll obligations when due.

(2) **SECURITY.** In order to obtain a loan under sub. (1) to pay producers for milk delivered during any pay period, the trustee may assign to the lender the trustee's security interest in those accounts receivable under s. ATCP 100.91 which pertain to the sale of milk or dairy products made from that producer milk. The assignment shall identify the specific dairy product sale invoices or vats of cheese to which the assigned security interest pertains. A trustee may not give any other security for a loan under this section.

(3) **LOAN PROCEEDS.** Funds borrowed by the trustee on the strength of accounts receivable under s. ATCP 100.91 shall be deposited to the trust account under s. ATCP 100.93, and shall be treated as proceeds from those accounts receivable.

(4) **LOAN REPAYMENT.** The trustee shall repay each loan under this section with cash proceeds received from those accounts receivable which are covered by the assigned security interest under sub. (2). The trustee may not use any other funds to repay a loan under this section.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.96 Annual and final accounting by trustee. (1) **ANNUAL ACCOUNTING.** On or before March 1 of each year, the trustee shall prepare a true and accurate account of all transactions affecting the trusteeship during the immediately preceding calendar year. The accounting shall be prepared on forms provided by the department, and the trustee shall provide copies to the department, the dairy plant operator, and all producers who ship milk to the dairy plant operator. As part of the trustee's annual accounting, the trustee shall certify the priority of the trustee's security interest in the dairy plant operator's inventory and accounts receivable, as required under s. ATCP 100.89 (5).

(2) **FINAL ACCOUNTING.** Upon termination of a trusteeship, the trustee shall prepare a final accounting on forms furnished by the department. Copies of the final accounting shall be provided to the department, to the dairy plant operator, and to producers who ship milk to the dairy plant operator.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

ATCP 100.97 Dairy plant operator's obligations.

(1) **GENERAL.** A dairy plant operator shall comply with all applicable requirements under this subchapter. The dairy plant operator shall not engage in any conduct which impairs the trustee's ability to carry out the trustee's obligations under this subchapter. If a dairy plant operator fails to comply with this subchapter, the department may, in addition to or in lieu of other sanctions, require the operator to file security under s. ATCP 100.45.

(2) **RECORDS.** Under a trusteeship, the dairy plant operator shall provide the trustee with producer payroll records, sales and accounting records, records of receipts and disbursements, and other records reasonably required by the trustee to carry out the trustee's obligations under this subchapter.

(3) **EXPENSES.** The dairy plant operator is responsible for all expenses reasonably incurred in the creation, operation and maintenance of a trusteeship under this subchapter.

History: Cr. Register, November, 1992, No. 443, eff. 12-1-92.

Subchapter VI — Discriminatory Payments to Producers

ATCP 100.98 Definitions. In this subchapter:

(1) "Base period" means the dairy plant operator's most recently completed fiscal year, or another representative period approved by the department.

(2) "Base period producer service cost" means a dairy plant operator's total cost, for the operator's base period, for all of the following:

(a) Dairy farm field service costs other than field service costs which are directly attributable to violations of ch. ATCP 60.

(b) Costs to test dairy farm milk shipments before the dairy plant operator commingles those milk shipments with other milk shipments at the dairy plant. Testing costs include lab testing, reporting and recordkeeping costs related to milk testing. Testing costs do not include costs incurred by a milk hauler to collect milk samples from dairy farms, nor do they include costs incurred because of producer's violation of ch. ATCP 60.

(c) Expenses to prepare and maintain producer payroll records and process payments to producers.

(d) Dairy farm license fees and other routine expenses which the dairy plant operator incurs in connection with the licensing and regulation of dairy farms.

(e) Other costs which the department allows in writing.

(3) "Base period pickup cost" means a dairy plant operator's total cost, for the operator's base period, to collect milk from dairy farms. "Base period pickup cost" does not include any of the following:

(a) Milk collection and hauling costs which the dairy plant operator charges to milk producers.

(b) Transportation or milk hauling costs incurred before the milk hauler arrives at the first dairy farm on the hauling route, or after the milk hauler leaves the last farm on the hauling route.

(4) "Milk price" means a producer's average gross pay per hundredweight less hauling charges, calculated for a pay period according to s. ATCP 100.75 (9).

(5) "Pay class" means a group of producers who qualify for the same volume premium.

(6) "Pickup cost per hundredweight" means the cost calculated under s. ATCP 100.983 (5) for a pay class or individual producer.

(7) "Producer service cost per hundredweight" means the cost calculated under s. ATCP 100.983 (4) for a pay class or individual producer.

(8) "Non-price consideration" means anything of monetary value which a dairy plant operator or the operator's agent offers or provides to a producer in return for the producer's sale of milk to the operator, but which is not reflected in the milk price. "Non-price consideration" includes monetary payments, goods, milk hauling services, farm and household services, prizes, price and financing considerations, and other things that have direct monetary value to the producer. "Non-price consideration" includes services which a milk hauler furnishes as an agent of a dairy plant operator.

(9) "Volume premium" means any form of milk price increment or non-price consideration which a dairy plant operator or the operator's agent offers or provides to a producer based on the producer's milk volume, or which the operator or agent offers or provides only to certain producers based on their milk volume.

Note: If a dairy plant operator pays a producer a higher price per hundredweight based on the total weight of any milk component (e.g., protein or butterfat) received from that producer, that price increment is a "volume premium" as defined under sub. (9). However, a per-hundredweight price increment based solely on the *percentage* contents of milk components in milk is not a "volume premium."

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.981 Price discrimination prohibited. Except as provided under s. ATCP 100.982, 100.983 or 100.984, no dairy plant operator may do any of the following if the operator's action injures any producer or injures, destroys or prevents competition between competing dairy plant operators:

(1) Discriminate between producers, directly or indirectly, in the milk price offered or paid to those producers.

(2) Discriminate between producers, directly or indirectly, in the value of any non-price consideration offered or provided to those producers. A dairy plant operator does not discriminate under this subsection if the operator offers the same non-price consideration to all producers on equal terms, so that the same non-price consideration is effectively available to all producers who wish to receive it.

Note: Section ATCP 100.981 is adopted under s. 100.20 (2), Stats., and other applicable statutes. A person who suffers a monetary loss because of a violation of s. ATCP 100.981 may therefore bring a private lawsuit against the violator under s. 100.20 (5), Stats., and may recover double damages, costs and reasonable attorney fees.

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.982 Exemptions. Section ATCP 100.981 does not prohibit a dairy plant operator from doing any of the following:

(1) Paying a different milk price for grade A versus grade B milk.

(2) Complying with a federal milk marketing order.

(3) Properly charging a producer, pursuant to ch. ATCP 60 or the procurement contract, for costs which the dairy plant operator incurs because of the producer's violation of ch. ATCP 60.

(4) Paying different milk prices to producers based on actual differences in the quality of their milk, or based on actual differences in the percentage content of milk components in their milk, provided that all of the following apply:

(a) The dairy plant operator pays for milk quality, or for the percentage content of milk components in a producer's milk, according to a written payment schedule which the operator announces and makes available on equal terms to all producers from whom the dairy plant operator buys milk.

(b) The payment schedule under par. (a) clearly indicates the amounts by which payments will vary based on actual differences in milk quality, or based on actual differences in the percentage content of milk components in a producer's milk.

(c) The dairy plant operator measures the differences under par. (b) using accepted scientific methods.

(d) The payment schedule under par. (a) does not discriminate between producers having the same milk quality, or the same percentage content of milk components in their milk.

(e) Milk quality and milk component payments are not based on milk volume or restricted to certain producers based on volume.

(f) The dairy plant operator complies with ss. ATCP 80.26 (2) and 100.75.

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.983 Cost-justification defense. (1) GENERAL. In any proceeding against a dairy plant operator, in which the operator is alleged to have discriminated between pay classes or individual producers in violation of s. ATCP 100.981, it is a defense for the operator to prove, based on documentary evidence which the operator possessed and relied upon at the time of the alleged discrimination, that the amount of the price discrimination per hundredweight between those pay classes or individual producers did not exceed, in any relevant pay period, the difference in the operator's relevant procurement cost per hundredweight between those pay classes or producers.

(2) **VOLUME PREMIUMS BASED ON TOTAL MILK VOLUME.** A dairy plant operator shall use the following relevant procurement costs per hundredweight to justify, under sub. (1), discrimination resulting from the payment of volume premiums based on total milk volume:

(a) *Pay class.* The operator's relevant procurement cost per hundredweight for each pay class is the operator's "producer service cost per hundredweight" for that pay class, calculated according to sub. (4)(a).

(b) *Individual producer.* The operator's relevant procurement cost per hundredweight for each individual producer is the operator's "producer service cost per hundredweight" for that individual producer, calculated according to sub. (4)(b).

(3) **VOLUME PREMIUMS BASED ON VOLUME PER PICKUP.** A dairy plant operator shall use the following relevant procurement costs per hundredweight to justify, under sub. (1), discrimination resulting from the payment of volume premiums based on volume per pickup:

(a) *Pay class.* The operator's relevant procurement cost per hundredweight for a pay class is the sum of the operator's "producer service cost per hundredweight" under sub. (4)(a) and "pickup cost per hundredweight" under sub. (5)(a), except that the operator may not include "producer service cost per hundredweight" if the operator also pays volume premiums based on total volume.

(b) *Individual producer.* The operator's relevant procurement cost per hundredweight for an individual producer is the sum of the operator's "producer service cost per hundredweight" under sub. (4)(b) and "pickup cost per hundredweight" under sub. (5)(b), except that the operator may not include "producer service cost per hundredweight" if the operator also pays volume premiums based on milk volume.

Note: If a dairy plant operator pays separate volume premiums based on total milk volume and volume per pickup, the operator must separately justify the total volume premiums under sub. (2) and the per-pickup volume premiums under sub. (3).

(4) **PRODUCER SERVICE COST PER HUNDREDWEIGHT.** (a) *For a pay class.* To calculate a dairy plant operator's "producer service cost per hundredweight" for a pay class in any pay period:

1. Determine the operator's base period producer service cost, as defined in s. ATCP 100.98 (2). Divide that cost by the average number of producers who shipped milk to the operator during the base period.

2. Multiply the result under subd. 1. by the number of producers in the pay class during the relevant pay period.

3. Divide the result under subd. 2. by the hundredweights of milk which the pay class produced during the relevant pay period.

This yields the operator's "producer service cost per hundredweight" for that pay class in that pay period.

(b) *For an individual producer.* To calculate a dairy plant operator's "producer service cost per hundredweight" for an individual producer in any pay period:

1. Determine the operator's base period producer service cost, as defined in s. ATCP 100.98 (2). Divide that cost by the average number of producers who shipped milk to the operator during the base period.

2. Divide the result under subd. 1. by the number of hundredweights of milk which the individual producer shipped to the operator during the relevant pay period. This yields the operator's "producer service cost per hundredweight" for that individual producer in that pay period.

(5) **PICKUP COST PER HUNDREDWEIGHT.** (a) *For a pay class.* To calculate a dairy plant operator's "pickup cost per hundredweight" for a pay class in any pay period:

1. Determine the operator's base period pickup cost, as defined in s. ATCP 100.98 (3). Divide that cost by the total number of farm stops made during the base period.

2. Multiply the result under subd. 1. by the number of stops made, during the relevant pay period, at dairy farms operated by producers in the pay class.

3. Divide the result under subd. 2. by the hundredweights of milk collected, during the relevant pay period, from producers in the pay class. This yields the operator's "pickup cost per hundredweight" for that pay class in that pay period.

(b) *For an individual producer.* To calculate a dairy plant operator's "pickup cost per hundredweight" for an individual producer in any pay period:

1. Determine the operator's base period pickup cost, as defined in s. ATCP 100.98 (3). Divide that cost by the total number of farm stops made during the base period.

2. Multiply the result under subd. 1. by the number of stops made at the producer's dairy farm during the relevant pay period.

3. Divide the result under subd. 2. by the hundredweights of milk collected from the producer's dairy farm during the relevant pay period. This yields the operator's "pickup cost per hundredweight" for that individual producer in that pay period.

(6) **COST ACCOUNTING.** (a) At the request of a dairy plant operator, the department may approve alternative methods for calculating relevant procurement costs per hundredweight under this section. The department shall give its approval, if any, in writing.

(b) Costs under this section shall be determined on the basis of generally accepted accounting principles using the accrual method of accounting.

(7) **VALUE OF NON-PRICE CONSIDERATION PER HUNDREDWEIGHT.** If a dairy plant operator seeks to cost-justify a discrimination in non-price consideration under s. ATCP 100.981 (2), the operator shall calculate the value of that non-price consideration per hundredweight by dividing the value of the non-price consideration provided in each pay period by the hundredweights of milk which the recipient of that non-price consideration produced during that pay period.

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.984 Meeting competition defense.

(1) **GENERAL.** In any proceeding against a dairy plant operator, in which the operator is alleged to have discriminated between producers or pay classes in violation of s. ATCP 100.981, it is a defense for the operator to prove that the operator discriminated between those producers or pay classes in good faith in order to meet competition.

(2) **PROOF REQUIRED.** No dairy plant operator may claim the meeting competition defense under sub. (1) unless the operator

proves all of the following, based on documentary evidence which the operator possessed and relied upon when the operator engaged in the alleged discrimination:

(a) The operator offered the discriminatory milk price or non-price consideration in response to a competitor's prior offer to producers in the operator's procurement area.

(b) The competitor's prior offer under par. (a) was still in effect when the operator offered the discriminatory milk price or non-price consideration.

(c) The operator's discriminatory milk price or non-price consideration was similar in kind to the competitor's prior offer under par. (a), and did not exceed the competitor's offer.

(d) The operator offered the discriminatory milk price or non-price consideration only in that part of the operator's procurement area which overlapped the competitor's procurement area, or only to those producers who received the competitor's prior offer under par. (a).

(3) **LIMITATIONS.** No dairy plant operator may claim the meeting competition defense under sub. (1) for either of the following:

(a) A milk volume premium which exceeds, for producers shipping equivalent volumes of milk, the milk volume premium offered or paid by the competitor whose competition the operator is purporting to meet.

(b) Discrimination which occurred more than 30 days after the last day on which the competitor's offer was in effect.

History: Cr. Register, September, 1996, No. 489, eff. 11-1-96.

ATCP 100.985 Demanding justification. (1) The department may, by written notice, require a dairy plant operator to file with the department the documentation which that operator relies upon to justify, under s. ATCP 100.982, 100.983 or 100.984, a payment or offer which appears to discriminate between producers or pay classes in violation of s. ATCP 100.981.

(2) A dairy plant operator shall file documentation in response to the department's demand under sub. (1) within 14 days after the operator receives that demand, or by a later date which the department specifies in its demand. The department may extend the filing deadline for good cause shown.

Note: See ss. 93.15 and 93.21(4), Stats.

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.986 Failure to justify discrimination; notice. (1) **DEPARTMENT NOTICE TO ALLEGED VIOLATOR.** If the department finds that a dairy plant operator's documentation under s. ATCP 100.985 fails to justify a discrimination in milk price or non-price consideration, the department may give the dairy plant operator written notice of that finding.

(2) **PUBLIC INSPECTION.** A notice under sub. (1) is open to public inspection under subch. II of ch. 19, Stats.

(3) **NOT A PREREQUISITE FOR ENFORCEMENT.** A notice under sub. (1) is not a prerequisite for an action to enforce this chapter or s. 100.22, Stats., nor is it a prerequisite for a private action under s. 100.20(5), Stats.

(4) **NOTICE DOES NOT PROVE VIOLATION.** A notice under sub. (1) does not prove that a dairy plant operator violated this chapter or s. 100.22, Stats.

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.

ATCP 100.987 Injury to producer. In a proceeding against a dairy plant operator under s. 93.06 (7) or (8), 100.20 (5) or (6), 100.22(4) or (5), or 100.26(3) or (6), Stats., proof that a complaining producer received a lower milk price or non-price consideration than another producer shipping milk to the same dairy plant during the same pay period is presumptive evidence of injury to that producer.

History: Cr. Register, September, 1996, No. 489, eff. 10-1-96.